

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37814
Docket No. MW-38725
06-3-05-3-48

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes –
(IBT Rail Conference
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The discipline assessed [Level 3 record suspension of twenty (20) days and a one (1) year probationary period] Trackman F. E. McCoy on September 26, 2003 for alleged violation of MWOR 1.15 and his alleged ‘. . . absence without proper authority on August 4, 5, 6, & 7, 2003, while working as Laborer, on duty 0630 hours at Longview, Washington . . .’ was arbitrary, excessive, an abuse of the Carrier’s discretion and in violation of the Agreement [System File S-P-1079-G/11-04-0073].
2. The discipline assessed [Level 4 record suspension of thirty (30) days and a one (1) year probationary period] Trackman F. E. McCoy on September 26, 2003 for alleged violation of MWOR 1.15 and his alleged ‘. . . absence without proper authority on August 8, 11 & 12, 2003, while working as Laborer, on duty 0630 hours at Longview, Washington . . .’ was arbitrary, excessive, an abuse of the Carrier’s discretion and in violation of the Agreement [System File S-P-1079-G/11-04-0073].
3. The discipline assessed [dismissal from service] Trackman F. E. McCoy on October 2, 2003 for alleged violation of MWOR 1.15 and his alleged ‘. . . absence without proper authority on

August 13, 14, 15, 18, 19, 20, 21 & 22, 2003, while working as Laborer, on duty 0630 hours at Longview, Washington . . . ' was arbitrary, excessive, an abuse of the Carrier's discretion and in violation of the Agreement [System File S-P-1079-G/11-04-0073].A

4. As a consequence of the violation referred to in Part (1) above, the Claimant shall have his record cleared of the charge leveled against him and he shall be compensated for all wage loss suffered."
5. As a consequence of the violation referred to in Part (2) above, the Claimant shall have his record cleared of the charge leveled against him and he shall be compensated for all wage loss suffered."
6. As a consequence of the violation referred to in Part (3) above, the Claimant shall reinstated to service with his seniority unimpaired, have his record cleared of the charge leveled against him and he shall be compensated for all wage loss suffered."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

By letters dated August 7, 12 and 22, 2003, the Claimant was notified to attend formal Investigations in connection with charges that the Claimant allegedly was AWOL during the period from August 4 through 22, 2003. After several postponements, all three Investigations were conducted on September 12, 2003. The Claimant was not present during the Investigations, however, because he was serving the remainder of a jail sentence. By letters dated September 26 and October 2, 2003, the Claimant was informed that as a result of the Investigations, he had been found guilty as charged, and that he was being issued Level 3 and Level 4 suspensions for his absence without proper authority and he was being dismissed from the Carrier's service for violating Maintenance of Way Operating Rule 1.15. The Organization thereafter filed an appeal challenging the Carrier's decision to discipline and discharge the Claimant. The Carrier denied the appeal.

The Carrier initially contends that the Hearing transcript proves that the Claimant was absent without authority beginning on August 2, 2003, because he was in jail. The Carrier maintains that the Organization never rebutted these facts, nor did it contend that the Claimant did not violate Rule 1.15. The Carrier argues that the record therefore contains a proven and uncontested violation of Carrier rules. The Carrier further asserts that the Board repeatedly has found that it is appropriate to discipline employees who are absent without authority while they are in jail.

The Carrier then addresses the Organization's argument that although the Claimant violated Rule 1.15, the amount of discipline assessed was excessive. The Carrier insists that the Claimant was not absent for just a few days, he was absent for several months while serving time in jail. The Carrier points out that the Claimant was not released from jail until October 1, 2003. The Carrier asserts that the Claimant cannot perform service for the Carrier from jail, and he therefore has no reasonable expectation to remain an employee of the Carrier.

The Carrier maintains that the Claimant has been disciplined for failure to protect his assignment on three previous occasions. The Carrier argues that under the factual circumstances present in this case, numerous Boards have determined that a carrier is not acting in an arbitrary or capricious manner by dismissing an incarcerated employee. As for the Organization's emphasis on the Claimant's ten years of service, the Carrier acknowledges that it does value employees who have dedicated many years of service to the Carrier. The Claimant's years of service, however, do not shield him from receiving warranted and appropriate discipline.

The Carrier points out that the Claimant was in jail and absent without authority for months. With regard to the Organization's appeals for leniency, the Carrier maintains that it sets the discipline, and the Board may not substitute its judgment for that of the Carrier.

The Carrier then addresses the Organization's unsupported allegation that the Claimant requested a leave of absence while he was in jail, and that the Carrier improperly denied that request. The Carrier insists that there is no proof that the Claimant ever made a request for a leave of absence. Even if the Claimant did make such a request, the Carrier asserts that a number of Awards have established that the Carrier is well within its managerial rights to deny a long-term leave of absence to an employee in jail.

As for the Organization's contention that the Carrier violated Rule 40 and the discipline therefore should be overturned, the Carrier contends that the Investigation was fair and impartial. The Carrier acknowledges that the Investigation transcripts for the Vice General Chairman initially were mailed to the wrong address. The record shows that the transcripts were mailed to the correct address after the Vice General Chairman informed the Carrier that he had not received them. The Carrier argues that there has been no showing of harm to the Claimant from this, and this is not sufficient to overturn the assessed discipline. The Carrier then argues that there is merit to the Organization's assertion that the Carrier failed to properly consider the appeal because the Claimant's case was presented to the PEPA board. The Carrier points out that the PEPA board reviews all dismissal cases; the PEPA board simply agreed that the discipline assessed the Claimant was appropriate.

The Carrier goes on to assert that even if this claim had any merit, the Claimant would not be entitled to any damages. There is no dispute that the Claimant was in jail at the time of the Investigation, and the Carrier maintains that the Claimant abandoned his job when he was absent without authority. The Claimant has a history of being absent without authority, and he must be held accountable for his actions. The Carrier maintains that even if the Board determines the Claimant's discipline was too harsh, the Claimant should be returned to service on a leniency basis and without any backpay.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that the Claimant was deprived of his right to a fair and impartial Investigation. The Organization asserts that the Carrier committed a number of errors, including failing to properly notify the Claimant of the charges leveled against him, holding each of the three Investigations without the Claimant's presence and thereby denying the Claimant the right to face his accusers and cross-examine witnesses, denying reasonable requests for additional postponements, improperly pyramiding one continuing absence into three separate absences, prejudging the Claimant's guilt, constructively denying the Claimant a proper appeal by failing to provide Investigation transcripts to his representative, failing to properly consider the Claimant's satisfactory record and 11 years of service, and imposing the excessive and unjust penalty of dismissal despite the existence of mitigating circumstances. The Organization insists that under these circumstances, the Carrier's disciplinary decisions must be rescinded and the instant claim sustained.

The Organization further argues that even if it is determined that the Claimant received his contractual due process rights, the Carrier's failure to consider his 11 years of satisfactory service before it rendered its discipline decisions destroyed any illusion of progressive discipline. The Organization maintains that dismissal was exceedingly harsh and unjust in this case.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before the Board.

The Board reviewed the evidence and testimony in this case and finds sufficient evidence in the record to support the finding that the Claimant was guilty of being absent without proper authority from August 4 through August 22, 2003. The record reveals that the Claimant was incarcerated for driving while intoxicated and remained in jail through the entire period that he was absent without authority.

Instead of charging the Claimant with one count of being absent without authority, the Carrier in this case decided to file three separate charges against the Claimant, one covering the period August 4 through August 7, 2003, another covering the period August 8 through August 12, 2003, and a third covering the

period August 13 through August 22, 2003. The Carrier tried the Claimant in absentia and it issued discipline against the Claimant in the following manner: The Claimant was issued 20-day suspension and a one-year probationary period for his absences without authority from August 4 through August 7, 2003; the Claimant was issued a 30-day suspension and a one-year probationary period for his absences from August 8 through August 12, 2003; and the Claimant was subsequently terminated for his absences without authority for the period August 13 through August 22, 2003.

The Board finds that the Carrier's action by issuing three separate letters for a continuous period of time and then subsequently avoiding the required progressive disciplinary process by issuing three separate disciplines to the Claimant for that one extended offense was unreasonable, arbitrary, and capricious.

The progressive disciplinary system contemplates that an employee will be given an opportunity to learn from the initial discipline so that he can correct his behavior in the future. If a Carrier can simply break up a lengthy absenteeism period into three separate sections and then issue three separate disciplines up to and including discharge for the same extended absence, the whole principle of progressive discipline is being avoided and we find that summary punishment is being issued. Discipline is supposed to be corrective rather than punitive. In this case, the Carrier's action toward the Claimant was punitive.

The Board finds that the Claimant must be reinstated to his employment but without backpay. The period of time that the Claimant was off shall be considered a lengthy disciplinary suspension. This Claimant had 11 years of seniority with the Carrier and that cannot be ignored by an employer as it was in this case in an expeditious and irresponsible attempt to simply terminate the Claimant's employment.

AWARD

Claim sustained in accordance with the Findings.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 21st day of June 2006.